

INTERBASIN TRANSFER OF WATER  
IMPLEMENTATION IN THE STATE OF NEBRASKA

Submitted to the  
State Office of Planning and Programming  
by  
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Nebraska Natural Resources Commission

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## PREFACE

Pursuant to an agreement dated May 1, 1975, and for full and adequate consideration therefore, the Natural Resources Commission agreed to do, perform, and carry out the following services through its principal contact for the contract, James R. Cook, Legal Counsel for the Commission:

A. Case Law Review of Transbasin Diversion. The Contractor will review the legal and institutional aspects of diversion of surface water and groundwater between and among various hydrologic basins in other states. The Contractor will determine what federal laws and court decisions have applicability in the diversion of waters from one hydrologic basin to another.

B. Applicability of Transbasin Diversion in Nebraska. The Contractor will determine the legal and institutional constraints to the diversion of groundwater and surface water between and among various hydrologic basins in Nebraska. Also to be considered are federal plans for marketing water from the mainstem of the Missouri River, and its potential impact on Nebraska.

C. Reports. The Contractor shall furnish to the Planning Agency a summary report to include a summary of major aspects of diversion of surface water and groundwater as outlined in Section A.; a summary of Section B.; and proposed legislation that would clarify the legal status of transbasin diversion as well as legislative changes that would be needed to permit transbasin diversion of surface waters and groundwater in Nebraska. The Contractor will furnish 25 copies of this report to the Planning Agency.

This report is submitted in compliance with the provisions of the contract as above cited.

The material presented herein does not necessarily represent the individual or collective views of the members of the Natural Resources Commission. All opinions and policy statements presented herein are presented as those, and solely those, of the author.

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WESTERN STATES AND THEIR RESTRICTIONS  
ON TRANSBASIN DIVERSIONS

There are a variety of restrictions on intrastate diversions of water in the western states. The following examples have been selected to illustrate the nature and extent of some of these restrictions.

ARIZONA

State law requires that written consent and approval must first be obtained from an irrigation district, agricultural improvement district, or water users association in order to sever or transfer water rights from lands within their exterior boundaries. Arizona law also requires the consent and approval of affected districts or associations prior to the severance or transfer of any right to use water from any watershed or drainage area which supplies or contributes water for the irrigation of lands within that district or association. This consent in written form must accompany the applications for severance or transfer of such water rights. Ariz. Rev. Stat. § 45-172 (4) and (5) (1967)

CALIFORNIA

Although providing for transbasin diversion pursuant to plans developed by the State, California legislation enacted in 1959 is careful to insure protection to the basin of origin.

It is hereby declared to be the established policy of this State that in the development and completion of any general or co-ordinated plan prepared and published by the Department of Water Resources or any predecessor thereof or successor thereto, all uses, including needs of the area in which the water originates, of water shall be given consideration.

Whenever the Legislature authorizes the construction or acquisition by the State of any project which will develop water for use outside the watershed in which it originates, the Legislature shall at the same time consider the authorization and the construction or acquisition of such other works as may be necessary to develop water to satisfy such of the reasonable ultimate requirements of such watershed as may be needed at the time the export project is authorized or as will be needed within a reasonable time thereafter. The authorization with respect to such additional works may provide for state acquisition or construction, in whole or in part, of any such additional works, or financial assistance to other entities in connection with the acquisition or construction of such works, or a combination thereof. Cal. Water Code § 108 (West Supp. 1971)

This provision contrasts with a 1931 statute which prevents granting priority to appropriations made pursuant to a state water plan if the water is deemed necessary for the development of the county in which it originates. Cal. Water Code § 10505 (West Supp. 1971). It is interesting that a statute limiting appropriations beyond county boundaries would be enacted and retained in a state like California, often recognized as a leader in interbasin transfers.

The final California law relevant to transbasin diversions was enacted in 1933 and applied only to the project known as the Central Valley Project.

. . . (A) watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom, shall not be deprived by the department directly or indirectly of the prior right to

all the water reasonably required to adequately supply the beneficial needs of the watershed area or any of the inhabitants or property owners therein. Cal. Water Code § 11460 (West Supp. 1971)

Consequently, in California , interests of the water deficient areas are subordinate to those of the area of origin or county of origin.

#### COLORADO

The Legislation enacted in 1943 by the Colorado Legislature requires water conservancy districts to safeguard present appropriations and prospective beneficial consumptive uses of water within that portion of the Colorado River Basin lying in the state when planning and constructing facilities for the removal of water from that basin.

Any works or facilities planned and designed for the exportation of water from the natural basin of the Colorado River and its tributaries in Colorado, by any district created under this article, shall be . . . designed, constructed and operated in such manner that the present appropriations of water, and in addition thereto prospective uses of water for irrigation and other beneficial consumptive use purposes. . . within the natural basin of the Colorado River in the State of Colorado, from which water is exported, will not be impaired nor increased in cost at the expense of the water users within the natural basin. The facilities and other means for the accomplishment of said purpose shall be incorporated in, and made a part of any project plans for the exportation of water from said natural basin in Colorado.

Colo. Rev. Stat. Ann. § 150-5-13 (2) (d) (1963)

This statute was meant to deter the exportation of water from the western slope to the eastern slope of the Rockies; however, the act has only been extended to water conservancy districts. Thus, the City of Denver has been able to implement transbasin diversions from the western slope to the eastern slope for future development without restriction by the above statute.

In Metropolitan Suburban Water Users Association v. Colorado River Water Conservation District, 148 Colo. 173, 365 P. 2d 273 (1961) the Supreme Court of Colorado stated "We find nothing in the Constitution which even intimates that waters should be retained for use in the watershed where originating. The waters here involved are the property of the public, not any segment thereof, nor are they dedicated to any geographical portion of the state. The right to appropriate water and put the same to beneficial use at any place in the state is no longer open to question." Id. at 202, 365 P. 2d 288-89.

OKLAHOMA

Legislation was implemented in 1957 establishing guidelines for the State Water Resources Board for water management in the state including area-of-origin protection provisions. This legislation states that the present and future needs of an exporting area must be provided for before transbasin diversion projects can be implemented. No. 502, Tit. VIII, (1957) Oka. Law 670.1 Also see Title IX.

OREGON

Water may be transported outside an irrigation district as long as the district receives compensation. As long as water is provided for irrigating lands of an irrigation district, the

excess water may be used by the district to own and operate domestic and municipal water works as well as sell water for such uses inside and outside the district.

#### TEXAS

Recent legislation directed at the development of a state water plan may have the effect of placing a fifty-year moratorium on permanent large-scale transbasin diversion projects. Furthermore, the legislation directs the Texas Water Development Board not to prepare or formulate plans which include transbasin diversion projects outside the basin of origin unless the water is excess to that which has been estimated as being required for use in that basin within the next fifty years. Earlier in Texas history, transbasin diversion projects were prohibited by the so called "Watershed Prejudice Act of 1913." The full impact of this legislation is unclear however, as it is questionable whether the act provides any safeguards for the future needs of a basin of origin.

#### Conclusion

It is apparent that the provisions of other states relating to the interbasin transfer of water range from virtually no restrictions to stringent, but sometimes conflicting, area of origin protections. If one common thread can be found in these various statutes, it is that they fail to provide any real definitive guidance to planners and administrators charged with the responsibility of designating "surplus" water available for exportation to other watersheds. Predicting the future never lends itself to accuracy, but the author believes that any legislation enacted authorizing transbasin diversion for the State of Nebraska could and should be somewhat



more specific than that enacted in other states, at least in terms of the criteria to be applied in the decision-making process.

## FEDERAL LAW AFFECTING TRANSBASIN DIVERSION

In the previous section, discussion was limited to that relating to the various state restrictions on intrastate transbasin diversion. A question not addressed thusfar is whether there are any restrictions imposed by the federal government on intrastate or interstate diversions of water.

### General Federal Authority.

The most expansive of federal regulatory powers is the authority to regulate commerce among the states, found in Art. I, § 8 of the Constitution. Under this provision the federal government has the power to govern interstate commerce and to promulgate rules preempting state law, independent of the question of ownership of water. This power has been extensively used in the water development area. In First Iowa Hydro Elec. Coop. v. Federal Power Commission, 328 U.S. 152 (1964) the federal agency empowered to authorize hydroelectric projects on waters subject to the commerce power was not required to submit to state rules and regulations as to how the water should be used. Federal Power Commission v. Oregon, 349 U.S. 435 (1955); and Wickard v. Filburn, 317 U.S. 111 (1942) further serve to demonstrate that only a minimal relationship to interstate commerce is necessary for the federal government to intervene under the guise of the commerce power.

The power to provide for the general welfare, also granted in Art. I § 8 of the Constitution, has been held to give Congress the constitutional authority to undertake reclamation projects, and in consequence thereof, to make federal rules for the uses and distribution of water even if such uses contravene state law. City of Fresno v. California, 373 U.S. 627

(1963), Ivanhoe Irr. Dist. v. McCracken, 357 U.S. 275 (1958) and Arizona v. California, 373 U.S. 546 (1963) demonstrate the additional authority vested by this provision in Congress to displace state law and to make federal rules for the management and implementation of federal projects. However, if vested rights are interfered with, and state regulations displaced, it is likely that the federal government would have an obligation to compensate for the taking of property under direction from the Fifth Amendment.

A source of conflict between the federal and state governments involves state policies of water management which frustrate federal planning or use. One such clash occurred in connection with the diversion by the Bureau of Reclamation of the flow of the San Joaquin River at Friant Dam, a feature of the Central Valley Project in California. Claimants of water rights below Friant Dam sought to have the usual flow maintained by filing an injunction suit in 1947 against Bureau of Reclamation officials, the United States, and certain water districts receiving diverted water. The City of Fresno intervened as a plaintiff, one of its claims being that it was entitled to preference by virtue of the California "watershed protection" statutes previously discussed. The State of California did not intervene in support of Fresno's claim. This protracted litigation, involving many issues, finally ended, adversely to the plaintiffs, in the United States Supreme Court in 1963. In its opinion, the Court concurred with the lower court's ruling that, although the "county of origin" and "watershed protection" statutes conferred rights upon Fresno, the United States was not precluded by sec. 8 of the Reclamation Act (32 Stat. 390; 43 U.S.C. § 372) or any other law from acquiring such rights through eminent domain. Thus Fresno was not entitled to a decree requiring Bureau officials to satisfy Fresno's water needs

before diverting San Joaquin water into other watersheds. City of Fresno v. California, 327 U.S. 627 (1939). One of the cases cited by the court of appeals in its opinion, later affirmed, was Ivanhoe, supra, a case in which the Supreme Court had made it clear that section 8 of the Reclamation Act does not raise all state water laws above federal laws.

Another leading case demonstrating Congressional authority in development of water resources is Arizona v. California, supra. The issue in this case was whether Congress had the authority to allocate or apportion the water of the lower Colorado Basin among the lower basin states through which the river runs. The Supreme Court answered the question in the affirmative. It was held that the statute in question allocated a certain portion of the anticipated flow to each of the lower basin states for use within the state. Furthermore, the court held that within each state Congress gave to the Secretary of the Interior authority to distribute water to individual users according to principals of allocation he might determine, and that he is not bound to follow state law governing distribution among competing users.

#### Federal Law Relating to State Restrictions on Interstate Diversions

The diversion of water from one state to another originally faced the barrier of state sovereignty. This was exemplified by the case of Hudson County Water Company v. McCarter, 209 U.S. 349 (1908), an action brought under a 1905 New Jersey statute expressly prohibiting the extra-territorial diversion of any fresh water out of New Jersey. In Hudson, the plaintiffs sought to enjoin the defendant company from carrying waters out of New Jersey for delivery to New York. The statute, in effect, denied the interstate diversion of water. An injunction was issued, affirmed by both the New Jersey Appellate Court and later the U.S. Supreme Court. It was held that present and future water needs

did not justify a state's prohibition of the extraterritorial diversion of an intrastate stream. In the opinion, Justice Holmes stated: "The right to receive water from a river through pipes is subject to territorial limits by nature, and those limits may be fixed by the State within which the river flows, even if they are made to coincide with the state line." Id. at 351. New Jersey was allowed, therefore to stop the private exportation of its water.

It is questionable whether Hudson should still be considered authoritative in light of a more recent case, City of Altus v. Carr, 255, F. Supp. 828 (W.D. Tex. 1966) aff'd per curiam, 385 U.S. 35 (1966). In this case, the City of Altus, Oklahoma procured a lease to obtain ground water from owners of land in Texas. The city had assumed a \$2 million bond obligation to finance the lease and diversion project. The Texas legislature subsequently enacted a law requiring express legislative authorization for the exportation and foreign use of water from any underground source in the state. As a result, the city sued for a declaratory judgement that the statute was unconstitutional and sought a permanent injunction against its enforcement. Citing Pennsylvania v. West Virginia, 262 U.S. 553 (1923) a natural gas transporting case, the three-judge federal district court found the Texas statute to be an unlawful burden on interstate commerce and granted the relief prayed for by the city. This decision was affirmed by the U.S. Supreme Court, without comment, thus perpetuating speculation concerning the constitutionality of state laws prohibiting the exportation of water. Since any distinction between the surface waters of New Jersey and the subsurface waters of Texas is, at best, tenuous, it is likely that Altus can be said to have overruled Hudson. Consequently, it appears that even though there may be no currently established definitive law on this subject, there is

considerable precedent to the effect that a state law prohibiting exportation of water resources, whether originating on or beneath the surface, is an unconstitutional impediment to interstate commerce.

#### Water Resources Planning Act

The only Congressional expression of intent with respect, specifically, to transbasin diversions can be found in the 1965 Water Resources Planning Act (79 Stat. 244, 42 U.S.C. § 1962) which seeks to coordinate water resources planning by all governmental and private agencies through establishment of river basin commissions. These commissions are required to report to the Water Resources Council, which in turn is composed of the heads of major federal water agencies. Of particular note here is the disclaimer that nothing in the act should be construed as authorizing any entity established pursuant thereto "to study, plan, or recommend the transfer of waters between areas under the jurisdiction of more than one river basin commission" (79 Stat. 244, U.S.C. § 1962-1). It is not apparent that this provision was intended to infer a general federal policy on transbasin diversions; the subject is simply beyond the scope of the immediate legislation. Other federal agencies are still free to propose projects involving transbasin diversions. In addition, as Nebraska is wholly contained within the jurisdictional area of the Missouri River Basin Commission formed in accordance with the Water Resources Planning Act, that Commission is free to consider transbasin diversions within the State as a part of its planning process.

#### Federal Plans to Market Water

By memorandum of agreement dated February 24, 1975, the Secretaries of Interior and Army have agreed to make water from the six mainstem reservoirs available for sale for industrial use. Although Nebraska

has already strenuously objected to such sales for a number of other reasons, it is also possible that such sales could have an adverse impact on the implementation of interbasin transfer schemes within the State of Nebraska. As proposed, the sales would be limited to water from the mainstem reservoirs. While only one major stream in Nebraska, the Niobrara, is tributary to the Missouri River above the last and smallest mainstem impoundment, Lewis and Clark Lake, long term contracts to provide water to industry from that reservoir could give the federal government priority to Niobrara River water over out-of-basin diversions subsequently approved by the State. In addition, and perhaps more serious in nature, is the possibility that such sales could deplete the flow of the Missouri River itself to the extent that large amounts of water would not be available from that source. Although current projections of industrial demand for Missouri River water do not indicate the probability of this occurring water requirements for energy development and production are tremendous, and the extent of the role of the Upper Missouri Basin states in meeting the future energy requirements has not yet been charted.

The reader should also be alerted that this analysis is made on the assumption that marketed water will be limited to that stored in the mainstem Missouri reservoirs. Future attempts to extend the marketing policy to other federally constructed reservoirs within the basin could result in even more serious potential consequences.

### Conclusion

It is apparent from the above discussion that there is no obvious federal policy in opposition to either intrastate or interstate trans-basin diversions of Nebraska water. If anything, state imposed

restrictions on diversions are looked upon with disfavor at the federal level. Assuming, therefore, that state diversion legislation does not serve to frustrate federal water development plans, no apparent federal restrictions on intrastate diversions of water exist per se. If federal assistance is provided, however, such projects will be subjected to the same federal tests as other large scale water projects, such as those prescribed by the National Environmental Policy Act of 1969 and the Federal Water Pollution Control Act Amendments of 1972. These or other federal requirements could present insurmountable obstacles to any specific diversion project, but determinations to that effect can only be made as specific diversion proposals are considered.



LEGAL AND INSTITUTIONAL CONSTRAINTS TO TRANSBASIN DIVERSION  
OF WATER IN NEBRASKA

There is considerable confusion as to whether or not transbasin diversions are legally permissible in Nebraska. Part of this uncertainty has stemmed from the two distinct doctrines of surface water law which exist in Nebraska. From the old common law, there was created the doctrine of riparian rights and from the "American" common law there developed the prior appropriation doctrine. In Nebraska, both of these doctrines have coexisted since 1895.

The concept of riparian rights equates a right to use water under land ownership. At common law, persons owning land along a stream or lake were called riparian proprietors, and each of these proprietors had a right to use water upon his own riparian land incident to his ownership. While the date of the first application of the riparian rule in the territory of Nebraska is uncertain, however, it is believed to have been firmly established as law at the time of statehood in 1867.

Riparian rights attach only to the use of surface water in a natural watercourse or natural lake. All land bordering on the watercourse or lake had riparian water rights attached. Riparian owners, however, were not free to draw any amount of water desired for use on the appurtenant land. Under the "reasonable use" doctrine, riparian use of the amount of water actually drawn had to be reasonable in relation to the needs of other riparians. Water for domestic purposes, e.g. drinking, cooking and watering domestic livestock, could be drawn ad libitum.

In 1895, the Legislature approved a complete revision of the Nebraska water laws. The act affirmed the right to divert unappropriated waters for beneficial use, i.e. the prior appropriation doctrine. It also dedicated water previously unappropriated to the use of the people. This revision has remained essentially unchanged since its enactment.

The concept of prior appropriation is usually defined as a doctrine in which a property interest in the use of a defined quantity of streamflow may be acquired by developing and applying it to a beneficial use. The determination of "beneficial use" was to a large degree a subjective test. Water diverted from a stream or lake under a valid appropriation permit under riparian law, did not need to be used on lands adjacent to the watercourse.

As might be expected, the riparian doctrine and the prior appropriation doctrine have not harmoniously coexisted. Early Nebraska cases involving the dual system set a precedent for the superiority of the appropriative right. Crawford Co. v. Hathaway, 67 Neb. 325, 93 N.W. 781 (1905). This approach was consistently maintained until 1966 when Wasserburger V. Coffee, 180 Neb. 149, 141 N.W. 2d 738, settled a conflict between riparian appropriators by a "balance of equities" test articulated in Restatement of Torts. Such a test had previously only been used to settle disputes between riparian v. riparian users. This new approach to riparian-appropriator conflicts has created uncertainty as to the correct test which should be or will be used in the future to settle such disputes. The status of water rights were further complicated in Brummond v. Vogel, 184 Neb. 415 168 N.W. 2d 24 (1969) when the Nebraska Supreme Court again in an unprecedented

decision allowed a domestic user of water without any type of water right to obtain an injunction against an appropriator. The court cited "unreasonable" not unbeneficial use of the water by the appropriator as the basis for their holding.

The existing legal constraints on transbasin diversions have been shaped by this dual system of surface water usage. Under the riparian doctrine such diversions of waters would probably not have been permissible. Osterman v. Central Nebraska Public Power and Irrigation District, 131 Neb. 356, 268 N.W. 334 (1936). Since riparians were entitled to a reasonable share of the water in the watercourse, removal of the water would have constituted injury to the other riparian water users.

Under the original Nebraska appropriation doctrine of 1889 it is also likely that transbasin diversions would have been disallowed. In particular, one section of the 1889 law read: "The water appropriated from a river or stream shall not be turned or permitted to run into the water or channel of any other river or stream than that from which it is taken or appropriated." Neb. Comp. Stat. Ch 93a Art. I, Section 6 (1889). However, the provision was amended in 1893 and is now found, unmodified since that time, at section 46-602, R.R.S. 1943.

"The water appropriated from a river or stream shall not be turned or permitted to run into the waters or channel of any other river or stream than that from which it is taken or appropriated, unless such stream exceeds in width one hundred feet, in which event not more than seventy-five percent of the regular flow shall be taken." (Emphasis added)

With the adoption of the emphasized phrase, the section would seem to provide a legislative sanction for diversion.

In 1895 the Legislature substantially revised then existing irrigation laws; using the Wyoming irrigation code as a model, a comprehensive statutory scheme was enacted. The above quoted section was one of the few prior sections not repealed as a part of that revision. In addition the new code contained another provision relevant to the diversion issue. This statute also remains unamended and in force today.

The owner or owners of any irrigation ditch or canal shall carefully maintain the embankment thereof so as to prevent waste therefrom, and shall return the unused water from such ditch or canal with as little waste thereof as possible to the stream from which such water was taken, or to the

Missouri River. Neb. Rev. Stat. § 46-265 (Reissue 1967)

Although this section does not explicitly prohibit interbasin transfer, it does require all the surplus water to be returned to the stream of origin or to the Missouri River. Since all of Nebraska is located within the Missouri River Basin, this section could be interpreted to authorize transbasin diversions by irrigation districts. This interpretation, however, has not been widely accepted.

Three Nebraska Supreme Court decisions have interpreted these two Nebraska statutes. In 1936 the court ruled the statutes did not authorize the Department of Roads and Irrigation to grant applications for interbasin transfers. In the Osterman case, supra, the principal question was the validity of an order granting to Central Nebraska Public Power and Irrigation District a water right permitting diversion of 600,000 acre feet of water from the Platte River. Approximately

sixty percent of the water was to be used in irrigating lands located in the basins of the Blue and Republican Rivers. Objectors included appropriators and downstream riparians in the Platte Valley.

The court cited Meng v. Coffee, 67 Neb. 500, 93 N.W. 713 (1903) for the proposition that water usage by riparian owners was to be based upon equality, and that each riparian was required to exercise his rights reasonably and with due regard for the rights of other riparians. From this the court concluded the right to use water at common law was limited strictly to riparian lands, and that at common law there was usually no right to transport waters over a divide or watershed that enclosed the source from which it was obtained. Thus, because the common law prohibited interbasin diversion, permission for such diversions must be granted from legislative enactment.

Recognizing this, the defendant, Tri-County Irrigation District (now called the Central Nebraska Public Power and Irrigation District), contended that legislative enactments allowed diversions from one watershed to another. The court disagreed and cited sections 46-265 and 46-206 as controlling.

The court indicated that it found an intent in the legislative history of the modern statutes to preserve the unused waters for the benefit of the source from which they were obtained. As for the words "or to the Missouri River", found in section 46-265, the court held they had no bearing whatsoever on the issue under consideration.

The court considered section 46-265 as controlling the operation of all irrigation ditches, and held it applicable to interbasin diversions because the water transported had to be carried away from its source by the use of irrigation canals. In line with this reasoning, the court held that a divide or watershed could not be crossed

by an irrigation ditch or canal where the unused waters would not be returned to the source from which they were taken. The legal effect of Osterman seemed to bar interbasin transfers in all cases.

The statutes were not again considered by the Nebraska Supreme Court for twenty-four years. Then, in 1960, the court decided Ainsworth Irrigation District v. Bejot, 170 Neb. 257, 102 N.W. 2d 416 (1960). In the Bejot case the plaintiffs had sought a permit to appropriate water from the Snake River via a canal for irrigation purposes. As opposed to the facts of Osterman, the Snake River Valley was not a farming area; sub-irrigation was not an issue, and the only downstream appropriators on the Niobrara River, of which the Snake River is a tributary, were two small power plants that were to be compensated for any damages suffered.

The Snake River flows north and slightly east into the Niobrara River, which empties into the Missouri River. The plaintiff's canal was to run for about 56 miles to and through the lands to be irrigated, with the unused waters emptying into the Niobrara River where they would have been eventually carried in any event. The canal would have intersected several small streams, all of which were tributaries to the Niobrara River. None of the water was to be returned to the Snake River.

In objection to granting a permit, the defendants claimed the appropriation to plaintiff would violate section 46-265 because some of the water taken from the Snake River would cross the divide and eventually flow into the Niobrara--an alleged illegal attempt to transport water by canal over a watershed or divide. Defendant's primary reliance was on the Osterman decision.

The court referred to its decision in Osterman but declined to

consider it controlling. The court recognized the following definition of a watershed:

. . . A river and all its tributaries constitutes a watershed, which may be defined as all the area lying within a divide, above a given point on a river or stream. The term watershed is synonymous with river basin, drainage basin, or catchment area, except in some instances, where by definition for specific purposes, in connection with specific arguments, the basin may have been extended upon the natural watershed. 170 Neb at 273, 102 N.W. 2d at 426.

Because the court was of the opinion that the Snake River and Niobrara River were one stream, basin or watershed, it concluded that the Osterman decision was entirely distinguishable as to both the facts and the law. The court, therefore, was not required to give sections 46-206 and 46-265 an interpretation which varied from that in the Osterman case.

Of significance is the fact that the Platte, Blue, and Republican Rivers (involved in the Osterman case) and the Snake and Niobrara Rivers (involved in Bejot) all empty into the same river--the Missouri. Under such facts, the statutory requirements of section 46-265 would not be violated regardless of the river under consideration. Due to this, the basis of the Bejot decision has been subject to serious question. In fact, it has been suggested that the Bejot decision has nullified the watershed limitation doctrine as espoused in the Osterman case. Johnson and Knippa, Transbasin Diversion of Water, 43 TEXAS L. REV. 1035 (1965). The diverse holdings of the two decisions point out the problems of attempting to deal with interbasin transfer by blanket statutory prohibitions.

Another aspect of the interbasin transfer problem which faces

Nebraska is illustrated by Metropolitan Utilities District v. Merritt Beach Company, 179 Neb. 783, 140 N.W. 2d 626 (1966), (hereinafter referred to as M.U.D.). The case was an appeal from an authorization by the Director of the Department of Water Resources which allowed Metropolitan Utilities District of Omaha to supplement its daily water supply in a maximum amount of 60,000,000 gallons of ground water from a well field to be located on the north bank of the Platte River and on an adjacent island in Sarpy County, approximately five miles upstream from the confluence of the Platte and Missouri Rivers. The water was to be pumped, treated, and conveyed by pipeline to the service area of M.U.D. in and around the City of Omaha. No direct transfer of water from the river was contemplated, as the entire supply was to be pumped from the ground. Expert testimony indicated that the source of the aquifer's recharge would be 4,000,000 gallons per day from underground waters and 56,000,000 gallons per day from surface waters of the Platte River. Other evidence established that the pumping would reduce the level of flow in the Platte River to some extent, but that it would not directly affect the level of ground water beneath the defendant's lands.

The defendants objected to the M.U.D. permit on the grounds that: (1) it would violate vested rights of riparian property owners by lowering the water table under their lands; and (2) the grant of the application amounted to an unlawful diversion of water from the Platte River watershed. As to the first objection, the court stated that Nebraska had never ruled upon a situation in which the right of the riparian owners to take percolating waters constituted an interference with the prior appropriation rights of persons on a nearby stream. The court concluded, however, that the defendants failed to show they were damaged;



and it then followed that they were not in a position to raise the objection.

In arguing the second objection, defendants relied upon the holding of the Osterman case that water cannot be transported and used outside a watershed. The court stated that while riparian rights still exist, they have been limited by rules of reasonable use and public interest; so where a riparian landowner's reasonable use is not impaired, the public interest demands that water be applied to a needed public purpose rather than be wasted. Having laid this foundation, the court analyzed again the rationale of the Osterman decision and did not consider it controlling because in Osterman the taking of water would have damaged the rights of others. But in the M.U.D. case no damage had been caused to downstream riparians or appropriators. In fact, had the water not been taken by M.U.D., it would have flowed unused out of the state; and the court concluded by holding that where the taking of water beyond a watershed does not injure appropriators or riparians, then no reason exists for not permitting an interbasin water transfer for a public and beneficial purpose.

The court in the M.U.D. case assumed that it was dealing with ground water rather than a diversion from a stream. This made discussion of sections 46-206 and 46-265 unnecessary. The question arises whether the case can be considered authority for only the transportation of ground water across a divide or watershed or whether it has equal applicability to interbasin transfer of stream water. It is of interest that the court in the M.U.D. case stated that underground waters, whether they be percolating waters or underground streams, are a part of the water referred to in the Constitution,

Article XV, and that ground or stream waters form part of the same hydrologic cycle. The opinion said:

"It is true that such waters are not concentrated as in a river nor do they move with the velocity of a river, but they do percolate through underground formations and have the same source and termination as surface water flowing in a river. Underground waters are a part of the source of water supply to a growing population and an expanding economy the same as the surface waters flowing in a live stream on the surface of the ground." 179 Neb. at 800, 140 N.W. 2d at 636.

Evidence in the M.U.D. case indicated that pumping ground water near the river influenced the level of flow to some extent and that the aquifer was dependent upon the river for recharge. However, the court, although recognizing the hydrologic fact of ground and stream water interconnection at this point on the Platte River, evidently decided that the immediate source of the water was ground water and thus gave no evidence of intent to discuss stream water diversions.

Summary. Although interbasin water transfers in Nebraska have been allowed and some may be permitted in the future, it is not clear under what circumstances and when this may be done. The two Nebraska statutes of special interest do not explicitly prohibit interbasin transfers, but they do present limitations.

In the Osterman decision the Nebraska Supreme Court held that a divide or watershed could not be crossed by an irrigation ditch or canal where the unused waters would not be returned to the source from which they were taken. The decision in Osterman seemed to prevent interbasin transfers in all cases, but in 1960 the Nebraska Supreme

Court in the Bejot case dispelled that contention. In the M.U.D. case the Nebraska Supreme Court again deviated from its position in Osterman and formulated the following rule: The question of allowing interbasin water transfers is to be decided upon the ground of reasonable use and all the factors that enter such a consideration including the reasonableness of a watershed diversion. It remains uncertain whether the M.U.D. decision involved only diversions from an immediate ground water source.

## RELEVANT CONSIDERATIONS PRIOR TO THE DEVELOPMENT OF TRANSBASIN DIVERSIONS

As discussed in the preceding section, the legal constraints to transbasin diversions in Nebraska can be eliminated through the passage of effective legislation. The diversion of water from one watershed to another, however, may have such broad ecological, political and economical ramifications that the feasibility of transbasin diversions cannot be realistically evaluated without considering some of the other factors involved in developing a cohesive water management program. Some of these factors include: the necessity of an integrated water system; registration of riparian rights; establishment of minimum stream flow and area of origin legislation; reevaluation of water preference statutes and duty of water laws; and the implementation of a seasonal permit system. A brief discussion of the interrelationship of these factors with transbasin diversions follows.

One problem of managing water in Nebraska is the existence of an artificial method of dividing water into two categories, ground water and surface water, with separate legal doctrines governing each category. This dichotomy fails to reflect the true status of water in the hydrologic cycle, that is, that ground water and surface water are interrelated. Ground water recharge is often derived from surface water flows. As the transfer of surface water from one area may eventually alter ground water supplies in the same area, both systems of water should be managed together, or conjunctively, to determine the total impact of the removal of water from a watershed. The best way to insure a complete analysis of the effects of transbasin diversion would be to have a more integrated system of water classification than currently exists in Nebraska law. Such systems of water management have been implemented in Kansas, Montana,

Alabama, North Dakota, and Utah to effectuate coordination of the diverse factors involved in developing water policies for the state.

The disadvantages of a dual system of water rights in the state exist not only in the distinction between ground water and surface water but also in the separate classification of water rights as either riparian or as prior appropriative rights. The continuance of unregistered riparian rights could prove detrimental to the functioning of the appropriation system; and could hinder coordinated planning efforts for transbasin diversion projects. There is clearly insufficient data regarding the existence of riparian rights today. While it is apparent that the major reliance in Nebraska is on appropriations, the case law indicates that a riparian exerting a claim in times of shortage may be granted injunctive relief rather than mere compensation. *Wasserburger v. Coffee*, 180 Neb. 149, 141 N.W. 2d 738 (1966). This implies that it is essential for comprehensive planning to conclusively ascertain the existence and impact of riparian rights and to require registration of these rights to afford a more accurate assessment of outstanding claims to water. Failure to do so could make it very difficult to accurately quantify existing claims on water when assessing the feasibility of transbasin diversion proposals.

The recognition that all sources of water are interrelated, however, is only the initial step in developing a cohesive and inclusive water transfer program for the state. Another element to be considered is the effect of transbasin diversions on surface water levels. Fear of diminished water supplies and devastating environmental consequences from the diminution of surface water could be abated through the adoption of minimum stream flow legislation for the rivers and streams of the state. Reservation of a minimal level for the people of Nebraska would help

assure the continued maintenance of the quality and quantity of the waters of a basin-of-origin. Establishment of such minimal flows would both protect environmental quality and provide for recharge of ground water supplies. Legislation providing for such protection has been implemented in a number of states, including Oklahoma, Colorado, and Mississippi.

In addition to setting aside a quantity of water necessary to maintain the integrity of the streams, consumptive water demands of the potential exporting basins of the state should also be projected and set aside. Such a determination of future needs is vital in the evaluation of how much water would be available for transfer without later causing injury to the basin-of-origin. Area-of-origin legislation has been quite effective in states such as Texas, California, and Colorado, in permitting transbasin diversion of water while protecting those people in the area where the water originated from being harmed. For example, in California, large scale diversion of water from the northern part of the state to the water deficient southern portion was accomplished by assuring the northern areas against possible injury from excessive diversion of water. As previously discussed in the discussion of California law, this legislation states that the watershed of origin can not be deprived directly or indirectly of the prior right to the water, i.e. the natural advantage theory.

There are a number of approaches to area-of-origin legislation which could be implemented in Nebraska. The first one, alluded to above, would involve quantifying the water needs, present and future, for the exporting basin. This amount would then be granted to the basin, with the surplus water being available for transfer. The chief deterrent to this approach is the fact that future needs are very difficult to ascertain. Consequently, the original reservation of

water could prove to be insufficient, thus limiting the growth of agricultural, industrial, and municipal development in the exporting basin.

A second approach in designing legislation would be to allow the exporting basin the right of recapture of the diverted water if shortage or increased demands in the basin of origin arose. This approach would allay local fears of future water shortages but would have the opposite adverse effect of discouraging investment in costly transbasin diversion projects. As there would be uncertainty concerning the continuing availability of water for transport, the feasibility of such projects would be virtually incapable of determination.

A third approach to legislation would be to consider protection for the exporting basin on a comparative benefit project-by-project basis. This would mean that the transbasin diversion project would be rejected if the benefits of the project would be outweighed by the potential harm to the basin of origin. As suggested in Johnson & Knippa, Transbasin Diversion of Water, 43 Tex. L. Rev. 1035 (1965):

"Transbasin diversion per se is neither good nor bad.

Statutes of general application, such as those in California, Colorado, and Nebraska, lack the flexibility demanded by the nature of the task. What is needed is machinery which will provide for thorough consideration of interests both inside and outside the basin of origin and set up as a standard for deciding the welfare of the entire state.

Future water supplies of basins of origin should be preserved in preference to proposed transbasin diversion in instances where the anticipated development of the originating basin, though proceeding slowly, will probably be of greater benefit to the state than would the proposed

transbasin diversion. Project proponents, whether the project involves transbasin use or not, should always be encouraged or required to develop nearby sources uniquely available to them before tapping sources much in demand by others, presently or prospectively. Claims of benefits on both sides must be subjected to searching examination."

Id. at 1060.

As is readily apparent, basin-of-origin protection could be very limited if this third approach were adopted. In contrast to a system simply making all waters of a state subject to appropriation and utilization at any location in the state, the basin of origin would have such waters reserved as could be expected to produce a more beneficial use of such waters where they originate. The diversion proposed would be sustained, however, if the future in-basin uses would be of only equal or of lesser benefit to the state as a whole.

Although such an approach is attractive from the standpoint of optimum resources development, it is not deemed to be socially or politically acceptable in Nebraska. Following heated discussions, the Nebraska Legislature has already on two different occasions rejected legislation providing for greater protection to the basin of origin (LB 257, 1947 Session of the Nebraska Legislature, and LB 311, 1953 Session of the Nebraska Legislature). It appears, therefore, that to be acceptable, transbasin diversion legislation must provide a significant degree of protection to the basin of origin. At the same time, the protection provided should not impose an impenetrable barrier to future investment in diversion schemes which would prove to be of true benefit to the State of Nebraska and of no real adverse consequences to the basin from which the water originated. An attempt is made in the



draft legislation appearing hereinafter to accomplish this through use of a permit system discussed later in this section.

While the assurance of an adequate supply of water for the basin of origin, regardless of the legislative approach used, is of paramount importance, other factors which could also be contemplated before enacting legislation allowing transbasin diversions include consideration of the balance the state intends to adopt between industrial, agricultural, and municipal users of water. While Nebraska originated as a farming state, there has been a rapid acceleration in industrial growth with concomitant demands for water by industry and municipalities. Such growth may be restricted, however, if sufficient water supplies are not available. A determination must be made whether the present preference statutes should remain in force; whether agricultural uses of water still should have an absolute preference over industrial uses; and to what extent municipalities should be allowed to expand their water demands to supply industrial growth within their boundaries. It might be advisable to equate municipal use (or at least portions thereof) with domestic use. While the absolute preference for domestic uses may need to continue, it may be better to remove the inflexible statutory preference for agriculture over industry, as in some areas of the state, water might be more efficiently employed for industrial rather than agricultural uses. Provisions should be made to identify those areas of the state where priority for agricultural uses is essential. In all other areas a free market system of water use might be feasible.

An additional consideration to be made in contemplating the feasibility of transbasin diversion would be the possible reevaluation of the reasonable use-correlative right system of managing ground water in Nebraska. This policy allows the individual the reasonable use of ground water on

his land, regardless of the inefficiency of the operations with no provision for sharing or allocation except in times of shortage. The allowance for the reasonable use of ground water on overlying land is a subjective test which can lead to inefficient use of water both by the incorrect application of water on the land or its consumption for nonproductive enterprises. Such a policy presents an obstacle to planners in those areas where the water could be put to more efficient use, including, in some cases, diversion to another basin.

The duty of other water laws in Nebraska might also be reviewed to ascertain if they are adequate to supply water needs without allowing for excess waste. Such a determination could be made on a basin-by-basin review with those areas refusing to access their water consumption policies becoming ineligible to receive water from other basins. In order to encourage water efficiency, voluntary programs of water salvage should be suggested. Participation in such programs would be facilitated by clarifying the present legal status of salvaged waters, in particular, by specifically allowing the right to claim recaptured waters to inure to the person who originally extended the effort to salvage them. Lastly, if the reclaimed waters could be transferred, possible financial compensation from such a transaction would encourage the initial monetary outlay to make such salvage attempts practical. Should such programs and legislative revisions fail to prevent waste, consideration may have to be given to more effective, but less popular measures, such as the levy of a severance tax on all water diversions and withdrawals.

An administrative system for approval of transbasin diversion proposals would also need to be established as a part of any diversion legislation. Implementation and coordination of transbasin diversion projects within the existing status of water rights would be more

effective if a multiple-interest state committee were established to guide transbasin diversion developments. Thorough review of proposals by such an organization acting in a strong advisory capacity to the Director of Water Resources would help to ensure that water practices in one area of the state would not adversely affect another area. One existing political entity already performing a similar role is the Natural Resources Development Fund Advisory Board. That same type of organization, with participation from: (1) The Department of Economic Development; (2) The State Office of Planning and Programming; (3) The Department of Environmental Control; (4) The Department of Agriculture; (5) The Game and Parks Commission; (6) The Conservation and Survey Division of UNL; and (7) The Nebraska Natural Resources Commission, would reflect the variety of interests and groups concerned with water usage in the state.

In addition to evaluating the feasibility of transbasin diversion projects in relation to the other water rights, other functions of an advisory board would include recommending appropriate conditions to be attached to permits authorizing diversion projects. The permit system would be an efficient way to administer the technicalities of the transfer program since even if water were to be freely transferrable, few individuals or organizations would consider doing so unless they were assured that the project could not be terminated within a short period of time by recapture of the water by the basin of origin. One way to minimize this hesitation by developers would be to authorize the issuance of permits for a specific number of years. The duration of the permit would have to reflect, at least, the time it would take to amortize the costs involved in diverting the water from one basin to another. Consequently, permits might run for as little as ten years or

as long as 50 years or more, depending upon the extent of the project. Failure to incorporate this type of assurance into the system would discourage large investment projects because the financial risk would be too great to justify large monetary expenditures.

While it would be advantageous to issue permits for a specified length of time, it would also be beneficial to authorize seasonal permits for diversion of the water during only those times of the year when water is naturally abundant. This procedure would provide for additional allocation corresponding to seasonal excesses of water availability. Such a program of water appropriation would encourage activities by industry or agriculture which could be accommodated through additional storage facilities to those seasons of excess, while still preserving water for those users holding regular appropriative rights in times of water scarcity.

In conclusion, providing for a truly comprehensive system for authorizing transbasin diversions would involve more than the adoption of legislation simply clarifying the legal status of such diversions in Nebraska. The problems facing implementation of transbasin diversions are not limited to those concerning the physical removal of water from one basin to another, but rather, include numerous policies and programs related to water management which will be affected by such activities. This is not meant to suggest that transbasin diversions are not feasible in Nebraska or that legislation authorizing such diversions should not be considered at this time. The potential for such a program of water usage is great, and its value to the state could be tremendous; however, it must be assessed in perspective to its relationship with and effect upon other aspects of water management. It is with this background of broad and seemingly contradictory principles of water management that the following suggested statute was drafted.

SUGGESTED LEGISLATION WITH EXPLANATORY COMMENTS

A BILL

FOR AN ACT relating to water; to authorize interbasin transfer of ground and surface waters; to provide conditions; to grant the Director of Water Resources duties and responsibilities; to provide for fees; to create a fund; to create an advisory board; to provide for appeals; to amend sections 46-234, 46-235, 46-236 and 46-265, Reissue Revised Statutes of Nebraska; and to repeal the original sections and also section 46-206, R.R.S. 1943.

Be it enacted by the people of the State of Nebraska,

Section 1. The Legislature hereby recognizes that the status of the law in the State of Nebraska regarding the transportation, storage, and utilization of water beyond the boundaries of the natural hydrologic basin wherein it is located lacks sufficient clarity to encourage the investment of funds in the study or construction of some water resources projects of potentially significant benefit to the State of Nebraska. It is further recognized that the responsibility for establishing definitive policy with respect to water resources utilization lies with the Legislature, and it is declared to be the policy of this state to authorize, subject to the conditions of this act, the transfer of water from one basin to another within the state whether such water originates beneath the surface of the ground or flows upon the surface thereof.

Comments. This section provides legislative recognition of the uncertainty presently existing in the state with respect to the legality of transbasin diversions or inter-basin transfers, declares it to be the policy of the state to authorize such transfers, subject to specified conditions, and makes it clear that the conditions of the act, as well as the basic authorization are to apply to ground water as well as surface water.

Section 2. As used in this act, unless the context otherwise requires:

- (a) Basin of delivery shall mean the watershed to which the water diverted or withdrawn from a basin of origin is transported or proposed to be transported for storage and/or utilization.
- (b) Basin of origin shall mean the watershed in which the point or proposed point of diversion or withdrawal of water, whether flowing beneath or upon the surface of the land, is located.
- (c) Beneficial use shall mean any use of water for domestic, agricultural, industrial, commercial, power production or ground water recharge purposes.
- (d) Board shall mean the advisory board created by Section 5 of this act.
- (e) Department shall mean the Department of Water Resources.
- (f) Director shall mean the Director of the Department of Water Resources.
- (g) Interbasin transfer shall mean the diversion or withdrawal of water from one watershed and the transportation to, storage and/or utilization thereof in another watershed for any beneficial use.
- (h) Person shall mean a natural person, partnership, association,

corporation, political subdivision or agency of the state or agency of the federal government.

- (i) Watershed shall mean any of the following natural hydrologic basins of the State of Nebraska: the White River-Hat Creek Basin; the Niobrara River Basin; the Platte River Basin, including therein the North Platte and South Platte River Basins; the Loup River Basin; the Elkhorn River Basin; the Republican River Basin; the Little Blue River Basin; the Big Blue River Basin; the Nemaha River Basin; and the Missouri Tributaries River Basin. The specific boundaries for such basins shall be those adopted by the Nebraska Natural Resources Commission for purposes of preparation of the State Water Plan.

Comments. The term "interbasin transfer" is defined in subsection (g) of this section, and is used throughout the bill in place of the term "transbasin diversion". The latter term seems to be applicable only to surface water diversions, and as the bill applies equally to ground water, the broader term is deemed more appropriate.

The definition of "watershed" in subsection (i) is critical to what constitutes an interbasin transfer. As formulated, it provides that only the major river basins of the state are considered watersheds for purposes of the act. As such, this definition codifies the apparent holding of Ainsworth Irrigation District v. Bejot, supra, which held that diversions from the Snake River, a tributary to the Niobrara River and part of the Niobrara Basin, did not constitute transbasin diversions as long as water was not transported outside the boundaries of the Niobrara River Basin. The definition may be contrary to the rationale of the Ainsworth case with respect to the inclusion of the Loup and Elkhorn River Basins as separate watersheds rather than as part of the Platte Basin. It is the author's belief, however, that these two basins are of such major significance to the state that diversions altering the locations at which the waters of these basins naturally enter the Platte Basin should be subject to the provisions of this act.

Subsection (i) also prescribes that basin boundaries adopted by the Natural Resources Commission for purposes of preparation of the State Water Plan should be used to locate the exact boundary lines between the major river basins. Although the specific location of these boundary lines may be subject to discussion in extremely flat areas where the location of the basin divide is difficult, if not impossible, to ascertain, they do constitute the most generally acceptable delineation currently available. In addition, as the potential for transbasin diversions could play an important role in the preparation of river basin plans and other aspects of the State Water Plan, it would seem good logic to utilize the same boundaries for both purposes.

Subsection (c) of this section provides a definition of beneficial use of water for purposes of the draft bill. The definition includes those types of water use commonly termed development uses, but does not include uses of water for recreation, environmental, or aesthetic purposes. Although this definition could certainly be altered to include any or all of such other uses, it is the author's belief that such uses could be better provided for by legislation protecting the flows of a basin of origin. The specific location of water for such purposes is not as important as it is in relation to development uses of water, and it is not deemed necessary to include such uses as uses subject to interbasin transfer.

Section 3. Nothing in this act shall be interpreted as prohibiting the diversion or withdrawal of water for storage and/or utilization of such water within the basin of origin, and such use is hereby expressly authorized, subject to compliance with all other provisions of law of the State of Nebraska relevant thereto, even if such storage or utilization involves the diversion of water from one natural hydrologic basin to another as long as both such basins are contained within the same watershed as defined in Section 2 of this act.

Comments. This section further clarifies the authority for utilization of water within a watershed as defined by Section 2 of the bill. Compliance with the conditions of the bill would not be necessary for the transfer of water from one subwatershed to another.



Section 4. (1) No person shall withdraw or divert water for the purpose of impounding or utilizing, consumptively or non-consumptively, such water outside of a basin of origin without first obtaining a permit therefore from the Department in accordance with the provisions of this act. Provided that, no permit issued pursuant to this act shall be required prior to the diversion or withdrawal of water for domestic consumption if such diversion or withdrawal would at no time exceed the rate of one hundred gallons per minute. Provided further that, no permit issued pursuant to this act shall be required prior to any other withdrawal or diversion of water for impoundment or consumptive or non-consumptive use of such water outside of a basin of origin if such diversion or withdrawal was authorized prior to the effective date of this act in accordance with all other provisions of law relevant thereto.

(2) In the event that any person shall file a complaint with the Director that any other person is making or is proceeding to make a diversion or withdrawal of water in violation of this section or of any conditions imposed by a permit issued pursuant to Section 6 of this act, the Director shall cause an investigation to be made, shall hold such hearing or hearings as are deemed appropriate, shall notify the complainant and the alleged violator of all findings made subsequent thereto, and shall take appropriate action to prevent or abate any such violation from occurring or continuing. Appropriate action may include the issuance of cease and desist orders and the commencement, maintenance, and prosecution of an action in the district court of the county in which the alleged violation is occurring or has occurred.

Comments. The first proviso in Section 4 is to protect individual domestic users of water whose contiguous tract of land may lie in two different watersheds. Although it is not known how many of such instances can be found in Nebraska, it seems that the minimal effect on the available water supply from domestic uses of 100 gallons per minute or less justifies the exclusion from the requirements of the bill. The second proviso would exempt existing interbasin transfers which have been accomplished in accordance with existing law, such as the Metropolitan Utilities District well field located in the Platte Valley.

Subsection (2) of Section 4 is necessary to authorize the Director of Water Resources to take whatever actions are necessary to prevent or to abate interbasin transfers processed in accordance with the draft bill. The authorization extends to persons who are proceeding to make an unauthorized diversion or withdrawal. It seems appropriate that such action should be taken before an alleged violator has expended large sums of money to affect the unauthorized diversion or withdrawal.

Section 5. In order to assist the Department in the administration of this act, an advisory board consisting of representatives of the following state agencies is hereby created: the Department of Economic Development, the State Office of Planning and Programming, the Department of Environmental Control, the Department of Agriculture, the Game and Parks Commission, the Conservation and Survey Division of the University of Nebraska, and the Nebraska Natural Resources Commission. The advisory board shall (1) assist the Director in development of rules and regulations necessary for the administration of this act which rules shall not be effective unless approved by a majority of the board; (2) develop and adopt its own rules and regulations governing its organization and procedure of operation; (3) conduct special studies necessary to the performance of its duties pursuant to this act or in accordance with requests of the Director for assistance on any matters relevant to the administration

of this act; (4) conduct any public hearings it deems necessary in the performance of its duties; and (5) utilize the staffs of any of the member agencies to assist in the performance of its duties.

All members and alternate members of such advisory board shall be appointed by the heads of their respective agencies, who may appoint themselves to such positions.

Comments. The primary reason for the creation of an advisory board is to assist the Director of Water Resources in making the findings required by Section 8 of the bill. The expertise found in the seven agencies named in Section 5 should minimize the need for the contracting out of the comprehensive studies and reviews which will be necessary prior to a determination on some of the projects which may be anticipated. The author has found a similar advisory board created to assist in the administration of the Resources Development Fund to be an excellent working body capable of providing valuable assistance not only to the agency which it advises, but also to the applicant.

Section 6. (1) Any person may file an application with the Department for a permit to effect and implement the interbasin transfer of any of the waters contained within the State of Nebraska. The application shall be accompanied by a fee payable to the Department and determined as follows: for the first fifty thousand acre feet of water proposed to be withdrawn or diverted annually, the fee shall be one dollar for each ten acre feet; for any additional water proposed to be diverted or withdrawn annually, the fee shall be one dollar for each twenty acre feet; provided that, no application shall be accompanied by a fee of less than one hundred dollars.

(2) Applications requesting a permit for the appropriation and interbasin transfer of waters subject to the provisions of Article 2 of Chapter 46, Nebraska Revised Statutes shall be filed and shall be processed; except as may be provided by this act, in the manner

prescribed by sections 46-233 to 46-243.

(3) Applications requesting a permit for the withdrawal and interbasin transfer of ground water as defined by section 46-635 shall contain all information deemed by the Director to be necessary to enable the Department and the advisory board to determine the nature, amount, and effect of the proposed withdrawal. If the point of the proposed withdrawal is located in a control area established pursuant to section 46-658, both this act and the Nebraska Ground Water Management Act shall apply, and separate applications shall be submitted for compliance with each of such acts. Upon receipt of any application filed pursuant to subsections (1) and (3) of this section, the Department shall (a) make a record of the receipt of such application, (b) cause the same to be recorded in its office, and (c) make a careful examination of the application to ascertain whether it sets forth all of the facts necessary to enable the Department to determine the nature and amount of the proposed withdrawal. If such an examination shows the application in any way defective, it shall be returned to the applicant for correction, with a statement of the correction required, within thirty days after its receipt; and thirty days shall be allowed for the refiling thereof and, in default of such refiling, the application shall be dismissed.

Comments. The application fee provided in subsection (1) of this section is somewhat arbitrary and needs additional study prior to enactment of this or any similar legislation. Applications received pursuant to the requirements of the bill may range from those for interbasin transfers of water to irrigate one farm or less to those requesting water for use on hundreds of thousands of acres of irrigable land. As the extent of analysis of such projects will vary greatly, the application fee, which is intended to at least partially offset the costs of that analysis,

must also be variable. As the analysis is essentially directed at the affects of the water use, it seems appropriate that the application fee be based upon the amount of water proposed to be utilized. As examples of the application of the proposed fee schedule, proposed uses of up to one thousand acre feet per year would be accompanied by a fee of \$100, uses of fifty thousand acre feet per year would require a \$5,000 application fee, one hundred thousand acre feet would require a fee of \$7,500, and two hundred thousand acre feet would require a fee of \$12,500.

Section 7. Upon the filing of a correct and complete application in accordance with the provisions of this act and of any rules and regulations established hereunder, the Director shall forward a copy to the Board and shall instruct the applicant to publish, within ninety (90) days after the filing of the application, at the applicant's expense, a notice thereof in a form prescribed by the Director in a newspaper of general circulation in the county of the point of diversion or withdrawal, and in a newspaper or newspapers of general circulation published within any other county or counties designated by the Director as being potentially affected by the proposed interbasin transfer. Such notice shall be published at least once each week for three (3) consecutive weeks and shall give all the essential facts as to the proposed diversion or withdrawal, among them, the places of diversion or withdrawal and of use, amount of water, the purpose for which it is to be used, the period of time for which the application is made, the name and address of the applicant and the time and place when the application will be taken up for consideration at a public hearing conducted before the Director and the board not less than seven (7) nor more than twenty-one (21) days after the last publication notice as above directed. In case of failure to give such notice in accordance with the rules and regulations applicable thereto within the time

required, or if such notice is defective the application shall be dismissed. Any interested party shall have the right to present testimony and evidence in support of or in opposition to the application at the scheduled hearing. The Director and the board shall particularly solicit evidence and testimony relating to the water-related needs of the basin of origin for the period of time for which the application for diversion or withdrawal is made. The hearing may at the discretion of the Director or a majority of the members of the board be held open for receipt of oral and/or written testimony for a period not exceeding one hundred twenty (120) calendar days.

Comments. Because the approval or rejection of an application for the interbasin transfer of water will depend heavily upon the projected needs of the basin of origin for such water over the time period for which the interbasin use is proposed, a public hearing with comprehensive notice to all interested parties is deemed necessary. Although emphasis is placed upon the receipt of testimony relating to the basin of origin's water needs, all evidence and testimony relevant to the proposed project would be received and would have to be considered by the Director and the advisory board prior to making its determination on the application.

Section 8. (1) No application relating to the interbasin transfer of water shall in any way be accepted, allowed, or approved unless and until the Director and a majority of the members of the board determine from the evidence presented at the hearing conducted in accordance with Section 6 of the act and from the results of any studies or investigations conducted by the Director or the board, that:

(a) There is surplus water available in the basin of origin for transportation to and use as proposed in the basin of delivery;

(b) The proposed project is technically, financially, and economically feasible;

(c) The proposal is consistent with the State Water Plan and any state land use plans;

(d) The adverse impacts, if any, on the natural environments of the basins of origin and delivery are minimized to the extent practicable, and are outweighed by the beneficial effects of the proposed project toward the optimum use of the waters of the state;

(e) The applicant has a need for the water and the use to which the applicant intends to put the water is a beneficial use;

(f) The applicant has no alternative sources of supply within the basin of delivery which are of equal technical, financial, and economic feasibility;

(g) The applicant is qualified, responsible, and legally capable of carrying out the proposed project;

(h) The project, if approved, would not violate or jeopardize existing compacts or decrees involving Nebraska and any other state; and

(i) The project would in no other way be detrimental to the public welfare.

(2) In determining whether there is surplus water available in a basin of origin for exportation to another watershed, the Director and the board shall, based upon all available information, project the quantity of water necessary to supply future demands in the basin of origin for the term for which the permit for the interbasin transfer is sought. All water-related needs of the basin of origin which are likely to arise during such period of time are to be

identified and inventoried, including, but not limited to, domestic, municipal, agricultural, industrial, fish and wildlife, hydro-power generation, pollution control, recreation and conservation needs. All water necessary to satisfy such projected needs, maintain ecological balance, and preserve a healthy environment within the basin of origin shall be reserved for the basin of origin and shall not be subject to diversion or withdrawal pursuant to the provisions of this act.

Comments. It is in this section that the criteria for approving an interbasin transfer project are itemized. Subsection (1) (a), relating to the availability of surplus water, is essentially defined by subsection (2) of this section. All of the projected water needs of the basin of origin for the period of time for which the permit is requested must be taken into account in the determination of whether or not a surplus is available. Even if the water related needs of the importing basin are so called "preferred" needs to those of the exporting basin, the exporting basin is entitled to retain all the water that is necessary to satisfy its own needs. Also to be included in the quantity of water not available as surplus is water sufficient to maintain ecological balance and preserve a healthy environment within the basin of origin. This amounts to limited protected flow legislation as minimum flows would have priority over out-of-basin usage. Left to future determination is the decision of whether protected flows should have priority over in-basin development.

Environmental considerations are further addressed by subsection (1)(d). That section requires that the adverse impacts of the interbasin transfer are first minimized and are second balanced against the beneficial effects of the proposed project, economic and otherwise. The purpose of this provision is to put environmental and economic considerations on an equal basis. A project can not be defeated simply because it has adverse environmental effects, nor can one be constructed simply because it has beneficial economic effects.

Subsections (1)(e) and (1)(f) may, among other things, be utilized to insure that an applicant has done all that is reasonable toward utilization of the waters available in its own watershed. If an applicant is not utilizing proper conservation measures for the water directly available to him, application of those conservation measures may



constitute an alternative source of supply within the basin of delivery and may eliminate the need for transported water.

Subsection (1)(i), the catch all criteria, seems necessary because of the tremendous variety of effects, beneficial and adverse, which different projects may have. An interbasin transfer project, for example, could cause deterioration of water quality, increased flooding potential, water logged lands, or any number of other unanticipated effects. Some consideration regarding such effects must be authorized without listing specifically at the risk of exclusion.

Section 9. (1) If the Director and the board determine, in accordance with Section 8 that the conditions of that section have been or can be satisfied in the implementation of the proposed project, the Director shall accept and allow such application as originally submitted or as modified in accordance with this section and shall issue a permit for the diversion or withdrawal and interbasin transfer of such water. Such permit shall be issued for the period deemed necessary by the Director to complete the project and to amortize the costs thereof, or for a period of sixty (60) years, whichever is the lesser period.

If necessary to insure the maintenance of sufficient water in the basin of origin to satisfy the projected water related needs of such basin during the permit period, or to prevent the proposed diversion or withdrawal from causing any significant increase in costs to the basin of origin in satisfying such water related needs, the Director may, in accordance with recommendations of the board, reduce the amount of water from that for which the application was made and/or limit to specified periods of the year the days on which the diversion or withdrawal may be accomplished. If necessary to satisfy any of the other conditions prescribed by Section 8 of the

act, the board may recommend and the Director may impose such other reasonable conditions as are jointly deemed appropriate.

(2) At the conclusion of the period of time for which a permit has been issued pursuant to subsection (1) of this section, neither the original applicant nor his or its successor in interest shall be authorized to continue any diversion or withdrawal approved in accordance with this act without first obtaining a renewal permit; provided, that the Director may extend the original permit period for not more than one year upon a showing that such time is necessary to complete the processing of the renewal permit. Application for renewal permits shall be filed and shall be processed as though they were original applications, and no favorable consideration shall be granted the applicant solely because of the renewal nature of the application; provided that, as between different projects involving the interbasin transfer of water from the same basin of origin, priority shall be granted in the order of original approval.

Comments. Intended as further protection to the basin of origin, Section 9 insures that the approval of an interbasin transfer project will not result in the perpetual loss of water needed for the basin of origin. Permits for the interbasin transfer, if approved, are to be issued only for the period needed for completion of the project and for amortization of the costs involved. A maximum period of 60 years for permit duration is established. Pursuant to subsection (2) applicants wishing to continue the interbasin transfer of water at the conclusion of the permit period are required to reapply, with the application being treated as though it were an original application. The water related needs of the basin of origin would again have to be projected and if it were found that the interbasin transfer was incompatible with those needs, the permit would be denied.

Section 9 also grants substantial authority to the Director and the advisory board to establish conditions of approval as even further protection to the basin of origin. The permit may reduce the amount of water from that applied for, may require that diversions or withdrawals

be made during periods of high flow, and may establish other conditions deemed appropriate from the findings made pursuant to Section 8 of the bill during the review of the application.

Section 10. There is hereby created the Interbasin Transfer Fund to be administrated by the Department of Water Resources and to which the State Treasurer shall credit to such fund such money as shall be paid to the state as fees in accordance with the provisions of this act and as shall be appropriated to the Fund by the Legislature. To the extent that funds are available, the Department may expend money from such fund to pay the costs incurred by the Department and by the advisory board in the administration of this act. Any money in the Interbasin Transfer Fund available for investment shall be invested by the state investment officer pursuant to the provisions of the Nebraska State Funds Investment Act.

Comments. This section creates the Interbasin Transfer Fund to which the fees paid pursuant to Section 6 would be deposited. It also authorizes deposits of any appropriations made by the Legislature, which appropriations should not be necessary if the fee schedule established is adequate. Moneys in the fund are to be utilized for the purpose of conducting the studies which are necessary prior to approval of any application.

Section 11. Nothing in this act shall be construed to repeal or amend existing law regarding the appropriation or withdrawal of surface or ground waters within the State of Nebraska except as specifically provided herein, and all such statutes shall be applicable to applications for the interbasin transfer of waters unless there is conflict between such statutes and this act. In that event, the provisions of this act shall apply.

Comments. This section makes it clear that the provisions of the draft bill are not to replace existing or hereinafter adopted provisions of law relating generally to surface and ground water use. The requirements of the bill are additional to those of general law on the subject and apply only in application to interbasin transfer proposals.

Section 12. Any person aggrieved by any order or action of the Director or of the advisory board issued or taken pursuant to the provisions of this act may appeal in the manner provided by Chapter 84, Article 9.

Section 13. That Section 46-234, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

46-234. Application for water; disapproval; effect; necessity for consent; perfection of appropriation; time allowed. If there is no unappropriated water in the source of supply, or if a prior appropriation has been perfected to water the same land to be watered by the applicant, the Department of Water Resources may refuse such application, and the party making such application shall not prosecute such work so long as such refusal shall continue in force. Applications for the appropriation of waters to be impounded or utilized outside a basin of origin may also be refused in accordance with the provisions of Sections 1 to 12 of this act. An application for appropriation shall not be exclusive of any of the lands included therein until the owner or owners of such land shall give consent to the same in proper form, duly acknowledged. No application made, or canal constructed, prior to the application of the water and the perfection of an appropriation therefor, or the filing of the consent herein provided, shall prevent other applications from being allowed, and other canals

from being constructed to irrigate the same lands or any of them. In case of an application for an appropriation of water for the development of water power, the department shall promptly act upon such application and limit the time within which such appropriation shall be perfected to the period within which the proposed power project can be completed by uninterrupted and expeditious construction.

Comments. As amendments to existing law, this section and sections 14, 15, and 16 are included to eliminate any ambiguity in application of the sections of law amended therein as a result of enactment of the remainder of this suggested bill.

Section 14. That section 46-235, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

46-235. Application for water; approval; conditional or partial approval; date of priority; hearing. If there is unappropriated water in the source of supply named in the application, and if such application and appropriation when perfected is not otherwise detrimental to the public welfare, the Department of Water Resources shall, subject to the conditions found in Sections 1 to 12 of this act, approve the same, by endorsement thereon, and shall make a record of such endorsement in some proper manner in its office and return the same so endorsed to the applicant, who shall, on receipt thereof be authorized to proceed with the work and to take such measures as may be necessary to perfect such application into an appropriation. The priority of such application and appropriation when perfected shall date from the filing of the application in the office of the department, and the date of filing shall be regarded as the priority number thereof. The department may, upon examination of such application, endorse it

approved for a less period of time for perfecting the proposed appropriation, or for a less amount of water, or for a less amount of land than applied for. An applicant feeling himself aggrieved by the action of the department shall, upon proper showing, be granted a hearing before the department, which hearing shall be conducted in accordance with the rules of procedure adopted by the department, and a full and complete record shall be kept of all such proceedings. When a complete record of the case has been made up, the department shall render an opinion of facts and of law based upon the evidence before it.

Section 15. That section 46-236, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

46-236. Application for water power; approval; lease from state; renewal; cancellation; grounds. Within six months after the approval of an application for water power, as provided for in section 46-234 and before placing water to any beneficial use, the applicant shall enter into a contract with the State of Nebraska, through the Department of Water Resources, for leasing the use of all water so appropriated. Such lease shall be upon forms prepared by the department, and the time of such lease shall not run for a greater period than fifty years; and for the use of water for power purposes the applicant shall pay into the state treasury on or before January 1, each year fifteen dollars for each one hundred horsepower for all water so appropriated. Upon application of the lessee or its assigns, the Department of Water Resources shall renew the lease so as to continue it and the water appropriation in full force and effect for an additional period of fifty years provided that, if the water appropriated for

such purposes is utilized outside the basin of origin, renewal of the lease and the water appropriation shall be governed by section 9 of this act. Upon the failure of the applicant to comply with any of the provisions of such lease and the failure to pay any of the fees herein specified, the department shall cancel such lease and appropriation. Upon the expiration of any lease under this section, or if the lease is renewed then upon the expiration of the renewal, the value of improvements made thereunder by any lessee shall be appraised by the department. From such appraisal the lessee shall have the right of appeal to the district court. The value of such improvements as finally determined shall be paid to the lessee owning them by any subsequent lessee.

Section 16. That section 46-265, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

46-265. Embankments; maintenance; return of unused water; duties of owner. The owner or owners of any irrigation ditch or canal shall carefully maintain the embankments thereof so as to prevent waste therefrom, and shall, unless otherwise authorized in accordance with the provisions of sections 1 to 12 of this act, return the unused water from such ditch or canal with as little waste thereof as possible to the stream from which such water was taken, or to the Missouri River.

Section 17. If any section in this act or any part of any section shall be declared invalid or unconstitutional, such declaration of invalidity shall not affect the validity of the remaining portions thereof.

Section 18. That original sections 46-234, 46-235, 46-236 and 46-265, Reissue Revised Statutes of Nebraska, 1943 and section 46-206, Reissue Revised Statutes of Nebraska, 1943, are repealed.

Comments. In addition to the sections amended in the draft legislation, this section also repeals section 46-206, R.R.S. 1943. One of the sections previously relied upon as basis for the prohibition of interbasin transfers, section 46-206 currently provides as follows:

46-206. Appropriation; water to be returned to stream. The water appropriated from a river or stream shall not be turned or permitted to run into the waters or channel of any other river or stream than that from which it is taken or appropriated, unless such stream exceeds in width one hundred feet, in which event not more than seventy-five per cent of the regular flow shall be taken.

This section is deemed unnecessary and improper if more comprehensive interbasin transfer legislation, such as the type suggested here, is adopted.